From this, Rey testified to his logical belief that Conant would rely upon Rey's broadcasting experience, and that if Rey ultimately explained that the project was not worth pursuing, Conant's business judgment would have been to back out of the agreement. Rey believed at the time of the injunction hearing that an adverse decision would have undermined the station; and he testified to this belief, revising that assessment at the approximate time that RBC lost its request for a preliminary injunction.

105. Rey's district court testimony serves as the only basis for the financial misrepresentation allegations. In testifying that an adverse ruling on the tower litigation would mean that Conant would no longer provide the necessary financial backing, Rey based his remarks on the unstated premise that, as discussed above, the station would be worthless and that he would not involve Conant in a worthless venture. As Rey further explained, Conant had not specifically told him that he would withdraw from the financing agreement if the injunction were denied. Rather, Rey had put himself into Conant's position and testified to what he believed Conant would have told him under the circumstances. If Rey had told Conant that the station was financially infeasible, Rey was certain that the latter would have refused to lend the necessary funds. However, Rey viewed his court testimony as responses to what "could happen" as a result of Conant's reliance upon Rey's broadcasting judgment.

106. Rey further accurately testified that "[t]here is an agreement for the financing of the station, and then this [tower litigation] hit and everything was out on hold." The discussion to items being on "hold" was shown by Rey's later testimony to have referred to the delay in memorializing the RBC financing agreement to writing because RBC was not as of yet free to

begin construction. Nevertheless, both Rey and Conant testified that the financial agreement remained in effect throughout the period.

107. Given the vast differences between the issues addressed in the current proceeding and those in the preliminary injunction hearing, the legal conclusions of the district court are not germane to this factual inquiry. Nevertheless, it is understood that the Court of Appeals remand relied, in part, on Judge Marcus' finding, that RBC had no financing whatsoever. 59 F.3d at 1371, citing 766 F. Supp. at 1145. The tremendous burden of persuasion placed upon plaintiffs in a preliminary injunction hearing required the district court to take a much different analytical posture than that of the Commission. The district court was free to ignore all but the strongest evidence in reaching its conclusion. As Judge Marcus noted, "a preliminary injunction is an extraordinary and drastic remedy." Rey v. Guy Gannett, supra, 766 F. Supp. at 1146. In that respect, the district court's overly broad declaration that "there is no convincing proof that [RBC] actually has financial backing...." is seen as uniquely belonging to the legally relevant analysis of an injunction hearing, and is inapposite to the factual inquiry here, since Judge Marcus was undoubtedly basing his finding on the fact that RBC hd no written financial document. At the very least, any weight to be given to the D.C. Circuit's pronouncement is severely undercut by its inconsistency with the evidence presented in the injunction hearing, and its complete contradiction by the evidence presented in this record.

108. Further distinguishing the district court's hearing from the current proceeding is the diversion in focus. The district court was not evaluating the "reasonable assurance" representations made to the Commission by RBC. Instead the Court, in determining whether an irreparable harm existed, scrutinized whether or not RBC was an "ongoing" business. Id. at

1148. Obviously, RBC failed to meet the high burden of persuasion required to prove the existence of an ongoing business. Id. With the ultimate focus of the district court's inquiry being the "ongoing" nature of RBC, the court was not, nor should it have been, scrutinizing the details of the RBC financial agreement.

109. The focus of the district court stands in stark contrast to the current proceeding where the ultimate inquiry is RBC's representation that it was and continued to be financially qualified to construct and operate as proposed. That RBC had a legitimate basis for this representation is decisional for this proceeding. See, Georgia Public Telecommunications Commission, 7 FCC Rcd 2942 (Rev. Bd. 1992). The important elements in determining "reasonable assurance" of financing were not within the scope of the district court.

110. RBC was not compelled to report Susan Harrison's or Rey's conclusion that a sixth market station would not have been viable, nor that if RBC found itself in that predicament, that Conant's financing would be lost. The record clearly shows that, by the time the preliminary injunction had been denied, Rey no longer subscribed to that gloomy forecast which he harbored for some period of time between November, 1990 and mid-1991. In its Report and Order adopting Section 1.65 of the Rules, the Commission explained that an applicant is required to report a change of circumstances... sufficiently altering [its] financial status as to be pertinent to [its] financial qualifications. Reporting of Changed Circumstances, 3 RR2d 1620,1625 (1964). Nothing developed on the district court record, and nothing which informed Rey's state of mind during the pendency of that proceeding required an amendment to RBC's application for extension of its construction permit. The possibility of a condition subsequent, i.e., RBC's status as a sixth station in the market, was too ethereal a concept to require reporting. The only

circumstance under which such a matter required disclosure would have come at the time Judge Marcus denied RBC's relief and then only if Rey continued to buy into the damaging sixth station scenario and Conant had agreed with him. As has been shown, Rey had markedly changed his thoughts on the station's viability by that time, so RBC was under no obligation to have amended the application, especially in light of Conant's continuing commitment.

C. FAILURE TO CONSTRUCT/WAIVER OF RULES

111. This issue inquires into whether or not RBC was less than candid or made affirmative misrepresentations regarding the "nature of the tower litigation" as described in RBC's fifth and sixth applications for the extension of its construction permit. A review of the record demonstrates that RBC has been truthful with the Commission at all times. Hence, this issue must also be resolved in RBC's favor.

112. RBC's fifth and sixth extension applications each stated that actual construction "has been delayed by a dispute with the tower owner which is the subject of legal action in the United States District Court for the Southern District of Florida (Case No. 90-2554 CIV. MARCUS)." In remanding this proceeding back to the Commission, the Court of Appeals appears to have adopted Press' claim that RBC's reliance upon the tower litigation as the basis for an extension of its construction permit may have been inaccurate because RBC, itself, had initiated the tower litigation and was not precluded from beginning construction by the pendency of that lawsuit. 59 F3d at 1371. The Court, quite naturally, was not aware of Rey's state of mind with regard to the tower litigation. Consistently, Rey testified to his recollection of the Judge Marcus' admonition at a prehearing conference that the status quo had to be enforced pending resolution of the motion for a preliminary injunction.

113. There is absolutely nothing in either the RBC fifth or sixth extension requests which is at odds with Rey's testimony or with the facts. To begin with, it is important to understand that RBC's construction permit was final, i.e., "free and clear" as Rey referred to it, on August 30, 1990. However, scarcely over one month later, RBC filed its lawsuit against the tower company. This development was not a charade intended to put off construction. Rather, Rey saw the lawsuit, at the time it was filed, as a matter of economic life or death. Conant was willing and able to provide financing at any moment that Rey requested him to loan the funds to construct. However, in Rey's mind, there was no valid way in which RBC could have moved forward as planned until the district court denied the motion for preliminary injunction. The correspondence between Rey and Gannett is further evidence of RBC's desire to take the necessary steps toward construction.

114. Rey had a reasonable belief that Judge Marcus had prevented the parties from engaging in any meaningful construction during the six month interval of litigation, a time period which Rey never thought would be required in order to secure a decision. His belief was premised upon two factors. First, that at the November, 1990 prehearing conference, the judge had instituted a status quo order with regard to any tower construction and, second, that it would have been impossible under the lease for RBC to have constructed without the cooperation of the landlord. Both reasons are entirely compelling. Rey conceded that he was unable to recall the specific language used at the November, 1990 prehearing conference, but he believed that the judge had ordered that no construction be undertaken during the pendency of the proceeding. When he was shown a copy of the transcript of the prehearing conference he did find the reference to "construction" that he had recalled.

115. In addition to Rey's belief that the judge had enjoined both parties from undertaking construction, Rey explained under cross-examination that even if the status quo had applied only to the defendant, Gannett, RBC still would not have been able to move forward to construct the facility. The lease (Rainbow Exhibit No. 6) precluded RBC from entering onto the property to do anything on its own, and the landlord was, itself, specifically prohibited from construction. The letter from Edwards to Press' President shows that the landlord was completely boxed in by the status quo order, and Gannett could not have accomplished anything more with RBC than it could have with Press or another potential tenant. Hence, Rey's testimony that the pendency of the tower litigation prevented RBC from constructing its facility was entirely reasonable.

116. It is impossible to review RBC's extension applications and to conclude that the reference to the tower dispute was in some way a misrepresentation of facts. It was not. Both the fifth and sixth extension requests accurately cited the litigation as a reason for not moving forward, a completely factual representation of the circumstances surrounding RBC's inability to construct. The exhibits attached to each extension request conform to Rey's testimony and demonstrate that RBC honestly reported the reasons that construction had not been completed. It would transcend reason to conclude that RBC was untruthful because, rather than referencing the status quo order to which Rey testified, the extension requests more broadly identified to the tower litigation as the impediment to moving forward. Surely, Rey's recollection of the prehearing admonition and the lease provisions which prevented the landlord from construction are properly subsumed under the phrase "dispute with the tower owner" that appeared in both extension requests.

117. Press attempted to place the tower litigation in an unfavorable light, as if RBC had no right to invoke important commercial obligations that it stood to derive from the lease. But, the mere fact that RBC initiated the lawsuit does not affect whether construction was delayed by circumstances beyond RBC's control. RBC had negotiated what it believed to be an exclusive lease in a competitive market. So important was its proposed position on the Gannett tower, that Rey believed an adverse decision on the preliminary injunction might doom the project forever. However, the economic need to preserve RBC's rights under the lease was not the prevailing reason to seek extensions of the construction permit. As shown, supra, RBC could not construct as long as the litigation was outstanding (a right which it certainly had in order to preserve its competitive position in the market) and the judge had effectively ordered that no construction could take place.

118. RBC could have undertaken construction at the point that Judge Marcus denied the preliminary injunction. The record does show that it expended some $60,000 on a transmitter building. However, a few weeks later, RBC was required to file its sixth application for an extension of its construction permit, and until such time as the Commission granted the pending extension request, RBC would have placed itself at significant risk if it had engaged in further construction. Nevertheless, in addition to the construction of the transmitter building, the record revealed that RBC had paid nearly one half million dollars to preserve its location on the Gannett tower.

119. RBC's desire to construct its facility was amply reflected in the record. The intervening factors of a six month district court litigation and the protracted period of time during which the extension requests remained pending before the Commission were matters beyond it's

control. Even if it were concluded that the prehearing status quo order which Rey recalled was incorrect because it related to the defendant rather than to RBC, Rey's honest belief totally belies any intent to deceive the Commission in the fifth and sixth extension requests. All the facts and circumstances surrounding the tower litigation must be addressed to appreciate Rey's state of mind, and when this is accomplished, no misrepresentation or lack of candor can be ascribed to RBC. Cf. Standard Broadcasting, Inc., 7 FCC Rcd 8571, 8574 (Rev. Bd. 1992) (disqualification may be appropriate where inaccurate information results from an intent to deceive). There was no misrepresentation included within RBC's extension applications, and so the issue must be resolved in RBC's favor.

* * * * *

120. The lengthy history of this proceeding which includes argument before the United States Supreme Court, caused the Commission to address its rules regarding the extension of construction permits. In fact, the Court of Appeals required the agency to do so when it ordered the Commission to address whether or not RBC had made the required showing under Section 73.3534 of the rules. 59 F.3d at 1372.

121. In its HDO, the Commission attempted to clarify its rule and noted that its prior decision to grant RBC's sixth extension application "was based on our established policy that in determining whether to grant an extension request, applicants are not entitled to credit for, and thus we will not consider, construction efforts or any other actions that occur after the expiration of an authorized construction period." HDO at par. 3 (citation omitted). The Commission

observed that what RBC believed and what it did during the period of time after its construction permit had expired was not relevant to its decision to grant the sixth extension request. Significantly, the Commission observed that it was unreasonable to require applicants to make further expenditures and continue construction efforts while their extension requests remained pending. HDO at par. 5.

122. The record clearly establishes that Rey believed RBC was entitled to a full 24 months in which to construct its facility after judicial review had been completed. When the fifth extension application was filed on January 25, 1991, approximately five months had passed since the conclusion of the period for judicial review (August 30, 1990). When RBC filed the sixth extension application on June 25, 1991, approximately ten months had passed. Rey believed that, until it held up resolution of the sixth extension request, the Commission normally treated such applications in a routine manner and that each extension application would be granted in turn until RBC had been provided with a full two year construction period following administrative litigation and any associated appeals.

123. Section 73.3598(a) of the Commission's rules provides as follows:

> Each original construction permit for the construction of a new TV broadcast station, or to make changes in an existing station, shall specify a period of no more than 24 months from the date of issuance of the original construction permit within which construction shall be completed and application for license filed.

The Commission, of course, realizes that intervening circumstances may affect the timely construction of television stations. Thus, Section 73.3534(b) of the rules provides in pertinent part:

> Applications for extension of time to construct broadcast stations... will be granted only if one of the following three circumstances have occurred: (1) Construction is complete and testing is underway looking toward prompt filing of

> a license application; (2) substantial progress has been made, i.e., equipment is on order or on hand, site acquired, site cleared and construction proceeding toward completion; or (3) no progress has been made for reasons clearly beyond the control of the permittee (such as delays caused by governmental budgetary processes and zoning problems), but the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction.

124. The HDO refers to Channel 16 of Rhode Island, Inc. v. FCC, 440 F.2d 266, 275-276 (D.C. Cir. 1971) for the proposition that a permittee's uncertainty due to Commission inaction is a sufficient basis to warrant grant of an extension of time on equitable or waiver theory. See, HDO, par. 7. Surely, the existence of appeals in the D.C. Circuit and the Supreme Court that involve issues relating to construction permits are extra-agency proceedings which still can result in significant uncertainty. Hence, the uncertainty occasioned by the federal appellate process and the significant risk that a permittee would take if it moved forward to construction serve as equitable grounds for the grant of extensions based on special circumstances. See, WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

125. In point of fact, RBC had been given less than a year in which to construct its television station. Waiver in such a case is amply justified since the two year construction period was absorbed by judicial review. It would be poor business practice, indeed, for a permittee in RBC's position to have constructed a full service television facility under a cloud of regulatory doubt. Furthermore, the record is replete with evidence that RBC could not have taken down its financing from its lender until such time as its construction permit was "free and clear". RBC should have been provided with a two year period from the completion of judicial review in which to construct WRBW(TV), and equitable considerations more than justify the grant of a waiver of Section 73.3598(a) of the rules.

126. RBC's sixth extension application could also have been granted under the provisions of Section 73.3534(b)(2) because progress during the fifth extension period (February 5, 1991-August 5, 1991) was substantial. RBC did not complete construction of the transmitter building until shortly after the fifth extension had expired, but it undertook construction of that building as soon as the status quo order was dissolved and RBC lost its request for a preliminary injunction. It is also important to consider the facts that RBC paid an enormous amount of tower lease rental during the fifth extension period, and that it continued to engage in preconstruction planning. Hence, RBC placed substantial funds at risk and had done actual construction prior to expiration of the fifth extension period. Substantial progress is evaluated on a case-by-case basis. See, New Orleans Channel 20, Inc. v. FCC, 830 F.2d 361 (D.C. Cir. 1987), and the record evidence in this proceeding demonstrates that RBC did make such progress during the fifth extension period.

127. Finally, RBC's extension application also satisfied Section 73.3534(b)(3) because the six month tower litigation began approximately three months prior to RBC's January 25, 1991 fifth extension application. The record demonstrates that the RBC-Gannett lease precluded RBC from actual construction without the landlord's cooperation. Given the fact that the landlord had been placed under a status quo order by the court, RBC's construction hiatus between February and June, 1991 resulted from reasons clearly beyond its control.

IV. CONCLUSION

RBC has shown that it is qualified to be a Commission licensee and that the Commission should either waive its rules or grant it an extension of time so that it can be licensed to operate Channel 65 at Orlando, Florida. The convoluted and professionally painful

history of this proceeding has largely resulted from a predatory licensee apparently willing and able to expend very significant resources in order to remove an operating competitor from the marketplace.

If RBC violated the Commission's ex parte rules, it did so without the mala fides required to disqualify it under the specified issue. Indeed, the question of a violation has always been a close one, but even assuming that there was a violation, RBC has demonstrated that there was no intention to violate Sections 1.1208 and 1.1210 of the Commission's ex parte rules.

Similarly, the record reveals that RBC was truthful and candid regarding its financial qualifications. Although perhaps it would have been wise to have reduced its loan agreement to writing, the Commission does not require such documentation, and the evidence showed that Howard Conant was ready to advance the necessary funds to RBC whenever Joseph Rey requested him to do so. The testimony that Rey provided in the district court hearing did not exhibit a misrepresentation of RBC's financial qualifications, and Rey adequately explained on this record his state of mind when he had provided that prior testimony.

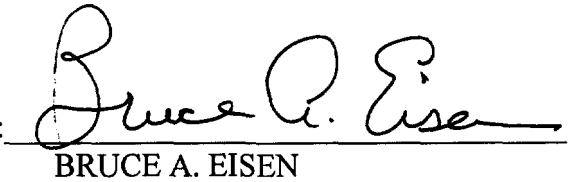
The issue specified to inquire into whether or not RBC had misrepresented the nature of the tower litigation turns largely on semantics. RBC's fifth and sixth extension applications provided the Commission with sufficient information concerning the reason why construction had not advanced. There was no reason for RBC to have broken down the specifics of the tower litigation any more than it did in the two extension requests. The explanations were forthright and accurate, and one would have to turn his or her back on reasonable business practices to conclude that the tower litigation was anything other than a valid reason to delay construction. Perhaps RBC could have moved more swiftly had it pulled the plug on the

litigation, but such an action would have compromised its place in the market and abrogated rights to which it was entitled. In order to preserve those rights, it was precluded from construction for the reasons that Rey outlined.

In light of the foregoing, RBC has satisfactorily discharged its burden of proof with regard to the designated issues. It has shown that it is qualified to be a Commission licensee and that a grant of the captioned applications will serve the public interest, convenience and necessity.

Respectfully submitted,

RAINBOW BROADCASTING COMPANY

By: 

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CERTIFICATE OF SERVICE

I, Toni R. Daluge, a secretary in the law firm of Kaye, Scholer, Fierman, Hays & Handler, LLP, do hereby certify that on this 26th day of September, 1996, copies of the foregoing "Proposed Findings of Fact and Conclusions of Law " were hand-delivered to the following:

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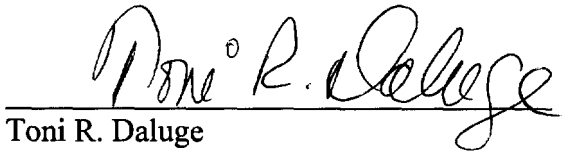

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